



Sikh Coalition Summary: COVID-19 and Equal Employment Opportunity

Please note that this information is not intended as legal advice. If you are in need of additional information or referrals, please contact the Sikh Coalition directly at <https://www.sikhcoalition.org/legal-help>.

The [Equal Employment Opportunity Commission](#) (EEOC) released a [guidance](#) document entitled "Pandemic Preparedness in the Workplace and the American Disabilities Act" in 2009 during the H1N1 outbreak, which remains relevant to the current pandemic. Information contained in the guidance that has been updated in 2020 to address specific concerns related to COVID-19 appears in the document in bold font. This guidance provides a series of questions and answers, the most relevant of which are detailed below. *Please note that this guidance should not be misconstrued as legal advice, and that you should reach out to an attorney for immediate legal concerns.*

The EEOC has also released information about Equal Opportunity (EEO) laws in the form of most frequently asked questions and answers regarding (1) disability-related inquiries and medical exams, (2) confidentiality of medical information, (3) hiring and onboarding, (4) reasonable accommodation, (5) pandemic-related harassment due to national origin, race, or other protected characteristics, (6) furloughs and layoffs, and (7) return to work, which can be found [here](#).

These two guidance documents provide a series of questions and answers, the most relevant of which are detailed below.

For background, the EEOC enforces workplace anti-discrimination laws, including the [Americans with Disabilities Act](#) (ADA) and the [Rehabilitation Act](#) (which include the requirement for reasonable accommodation and non-discrimination based on disability, and rules about employer medical examinations and inquiries), [Title VII of the Civil Rights Act](#) (which prohibits discrimination based on race, color, national origin, religion, and sex, including pregnancy), the [Age Discrimination in Employment Act](#) (which prohibits discrimination based on age, 40 or older), and the [Genetic Information Nondiscrimination Act](#).

EEO laws continue to apply during the time of the COVID-19 pandemic, but they do not interfere with or prevent employers from following the [guidelines and suggestions made by the CDC or state and local public health authorities](#) about steps employers should take regarding COVID-19. Employers should be sure to follow the most current information on maintaining workplace safety, keeping in mind that guidance from public health authorities will likely change as the pandemic evolves.

The Americans with Disabilities Act

The ADA, which protects applicants and employees from disability discrimination, regulates employers' disability-related inquiries and medical examinations for all applicants and employees, including those who do not have ADA disabilities. It prohibits covered employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a "direct threat" (i.e. a significant risk of substantial harm even with reasonable



accommodation). Additionally, the ADA requires reasonable accommodations for individuals with disabilities (absent undue hardship) during a pandemic.

The ADA prohibits an employer from making disability-related inquiries and requiring medical examinations of employees, except under limited circumstances, as set forth below:

1. The ADA regulates disability-related inquiries and medical examinations in the following ways:
 - a. **Before a conditional offer of employment:** The ADA prohibits employers from making disability-related inquiries and conducting medical examinations of applicants before a conditional offer of employment is made.
 - b. **After a conditional offer of employment, but before an individual begins working:** The ADA permits employers to make disability-related inquiries and conduct medical examinations if all entering employees in the same job category are subject to the same inquiries and examinations.
 - c. **During employment:** The ADA prohibits employee disability-related inquiries or medical examinations unless they are job-related and consistent with business necessity. Generally, a disability-related inquiry or medical examination of an employee is job-related and consistent with business necessity when an employer has a reasonable belief, based on objective evidence, that (1) an employee's ability to perform essential job functions will be impaired by a medical condition or (2) an employee will pose a direct threat due to a medical condition.
 - d. **Hiring during the COVID-19 pandemic:**
 - i. **Screening for COVID-19 symptoms:** An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. This ADA rule allowing post-offer (but not pre-offer) medical inquiries and exams applies to all applicants, whether or not the applicant has a disability.
 - ii. **Delayed start dates:** According to current CDC guidance, an individual with COVID-19 or symptoms associated with it should not be in the workplace. Therefore, an employer may delay the start date of an application who has COVID-19 or symptoms associated with it. The CDC has issued [guidance](#) applicable to all workplaces generally. Employers should continue to follow the most current information from the CDC and state public health authorities on maintaining workplace safety. The ADA does not interfere with employers following recommendations of the CDC or public health authorities, and employers should feel free to follow those recommendations.
 - iii. **Withdrawing an offer:** An employer may withdraw an offer of employment if the employer needs the individual to start immediately but s/he has COVID-19 or symptoms of it.

2. All information about applicants or employees obtained through disability-related inquiries or medical examinations must be kept confidential. Information regarding the medical condition or history of an employee must be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record.



Direct Threat and Pandemics

A "direct threat" is a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. Individuals with disabilities who pose a direct threat despite reasonable accommodation are not protected by the nondiscrimination provisions of the ADA. Assessments into whether an employee poses a direct threat in the workplace must be based on objective, factual information--not on subjective perceptions or irrational fears about a specific disability or disabilities. The EEOC's regulations identify four factors to consider when determining whether an employee poses a direct threat: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that potential harm will occur; and (4) the imminence of the potential harm.

Based on guidance of the CDC and public health authorities as of March 2020, the COVID-19 pandemic meets the direct threat standard. The precautions issued by public health authorities and measures taken by state and local authorities support a finding that a significant risk of substantial harm would be posed by having someone with COVID-19, or symptoms of it, present in the workplace at the current time. At such time as the CDC and state/local public health authorities revise their assessment of the spread and severity of COVID-19, that could affect whether a direct threat still exists.

Screening Practices

The ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity." Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take steps to determine if [employees entering the workplace have COVID-19](#) because [an individual with the virus will pose a direct threat](#) to the health of others. Therefore, an employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus.

Employers should ensure that the tests are accurate and reliable. For example, employers may review [guidance](#) from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as guidance from CDC or other public health authorities, and check for updates. Employers may wish to consider the incidence of false-positives or false-negatives associated with a particular test. Finally, note that accurate testing only reveals if the virus is currently present; a negative test does not mean the employee will not acquire the virus later.

Importantly, employers cannot require employees to take antibody tests. In light of the CDC's [Interim Guidelines](#) that antibody test results "should not be used to make decisions about returning persons to the workplace," an antibody test does not meet the ADA's "job related and consistent with business necessity" requirement.

When screening employees entering the workplace during this time, employers should rely on the CDC, other public health authorities, and reputable medical sources for guidance on emerging symptoms associated with the disease. These sources may guide employers when choosing questions to ask employees to determine whether they would pose a direct threat to health in the workplace. For example, additional symptoms beyond fever or cough may include



new loss of smell or taste as well as gastrointestinal problems, such as nausea, diarrhea, and vomiting.

Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever. As with all medical information, the fact that an employee had a fever or other symptoms would be subject to ADA confidentiality requirements.

Reasonable Accommodation

Generally, the ADA requires employers to provide reasonable accommodations for known limitations of applicants and employees with disabilities, unless doing so poses an undue hardship.

A reasonable accommodation is a change in the work environment that allows an individual with a disability to have an equal opportunity to apply for a job, perform a job's essential functions, or enjoy equal benefits and privileges of employment. An accommodation poses an undue hardship if it results in significant difficulty or expense for the employer, taking into account the nature and cost of the accommodation, the resources available to the employer, and the operation of the employer's business.

Note that the ADA does not require employers to accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom she is associated.

If an employee entering the worksite requests an alternative method of screening due to a medical condition, an employer should proceed as it would for any other request for accommodation under the ADA or the Rehabilitation Act. If the requested change is easy to provide and inexpensive, the employer might voluntarily choose to make it available to anyone who asks, without going through an interactive process. Alternatively, if the disability is not obvious or already known, an employer may ask the employee for information to establish that the condition is a [disability](#) and what specific limitations require an accommodation. If necessary, an employer also may request medical documentation to support the employee's request, and then determine if that accommodation or an alternative effective accommodation can be provided, absent undue hardship.

Similarly, if an employee requested an alternative method of screening as a religious accommodation, the employer should determine if accommodation is [available under Title VII](#).

ADA and Title VII Compliant Employer Practices during COVID-19

Consistent with CDC guidance on COVID-19, employers may ask employees who report feeling ill at work, or who call in sick, questions about their symptoms to determine if they have or may



have COVID-19. Currently these symptoms include, for example, fever, chills, cough, shortness of breath, or sore throat.

Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions as of March 2020, employers may measure employees' body temperature. As with all medical information, the fact that an employee had a fever or other symptoms would be subject to ADA confidentiality requirements. However, employers should be aware that some people with COVID-19 do not have a fever.

Employers may follow the advice of the CDC and state and local public health authorities regarding information needed to permit an employee's return to the workplace after traveling--whether for business or personal reasons--during the pandemic.

An employer can send an employee with COVID-19 or symptoms associated with it home.

An employer may not ask employees who do not have symptoms consistent with COVID-19 whether they have a medical condition that could make them particularly vulnerable to COVID-19 complications. However, employers should allow employees with symptoms consistent with COVID-19 to stay at home.

Employers may encourage employees to telework as a means of infection control. In addition, employees with disabilities that put them at high risk for complications of pandemic influenza may request telework as a reasonable accommodation to reduce their chances of infection during a pandemic.

Employers may also require employees to adopt infection-control practices at the workplace, such as regular handwashing, coughing and sneezing etiquette, proper tissue usage and disposal, and wearing personal protective equipment designed to reduce the transmission of COVID-19. Where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves), the employer should provide these, absent undue hardship.

While a vaccine for COVID-19 does not yet exist, it is important to note that employers covered by the ADA and Title VII of the Civil Rights Act of 1964 may not require employees to get vaccinated regardless of their medical conditions and/or religious beliefs. Rather, these individuals are entitled to a reasonable accommodation unless such accommodation would pose an undue hardship.

Employers are required to continue providing reasonable accommodations for employees with known disabilities that are unrelated to the pandemic, barring undue hardship or a showing that the employee poses a direct threat even after reasonable accommodation. Employers should provide disabled employees with the same reasonable accommodation at a telework site that s/he had at the workplace, absent due hardship. In the event of undue hardship, the employer and employee should cooperate to identify an alternative reasonable accommodation. For example, if an employee with low vision has a screen-reader on her office computer as a reasonable accommodation, and the employer provides laptop computers so that employees can work remotely, the employer should provide that employee with a laptop with a screen-



reader installed.

The rapid spread of COVID-19 has disrupted normal work routines and may have resulted in unexpected or increased requests for reasonable accommodation. Although employers and employees should address these requests as soon as possible, the extraordinary circumstances of the COVID-19 pandemic may result in delay in discussing requests and in providing accommodation where warranted. Employers and employees are encouraged to use interim solutions to enable employees to keep working as much as possible.

Employers may provide any flexibilities to employees (including telework, modified schedules, or other benefits to employees with school-age children due to school closures or distance learning during the pandemic. However, they may not treat employees differently in providing these types of benefits based on sex or other EEO-protected characteristics. For example, under Title VII, female employees cannot be given more favorable treatment than male employees because of a gender-based assumption about who may have [caretaking responsibilities](#) for children.

Similarly, an employer may not exclude an employee involuntarily from the workplace based on pregnancy. Sex discrimination under Title VII of the Civil Rights Act includes discrimination based on pregnancy. Even if motivated by benevolent concern, an employer is not permitted to single out workers on the basis of pregnancy for adverse employment actions, including involuntary leave, layoff, or furlough.

Pandemic-Related Harassment based on National Origin, Race, or Other Protected Characteristics

It is essential to remember that the anti-discrimination laws enforced by the EEOC [remain in effect](#) during the COVID-19 pandemic.

Managers should be alert to demeaning, derogatory, or hostile remarks directed to employees who are or are perceived to be of Chinese or other Asian national origin, including about the coronavirus or its origins.

All employers covered by Title VII should ensure that management understands in advance how to recognize such harassment. Harassment may occur using electronic communication tools – regardless of whether employees are in the workplace, teleworking, or on leave – and also in person between employees at the worksite. Harassment of employees at the worksite may also originate with contractors, customers or clients, or, for example, with patients or their family members at health care facilities, assisted living facilities, and nursing homes. Managers should know their legal obligations and be [instructed](#) to quickly identify and resolve potential problems, before they rise to the level of unlawful discrimination.

Employers may choose to send a reminder to the entire workforce noting Title VII's prohibitions on harassment, reminding employees that harassment will not be tolerated, and inviting anyone who experiences or witnesses workplace harassment to report it to management. Employers may remind employees that harassment can result in disciplinary action up to and including termination.



Employers can help reduce the chance of harassment by explicitly communicating to the workforce that fear of the COVID-19 pandemic should not be misdirected against individuals because of a protected characteristic, including their [national origin](#), [race](#), [religious discrimination](#), or other prohibited bases.

Practical anti-harassment tools provided by the EEOC for small businesses can be found here:

- Anti-harassment [policy tips](#) for small businesses
- Select Task Force on the Study of Harassment in the Workplace (includes detailed recommendations and tools to aid in designing effective anti-harassment policies; developing training curricula; implementing complaint, reporting, and investigation procedures; creating an organizational culture in which harassment is not tolerated):
 - [report](#);
 - [checklists](#) for employers who want to reduce and address harassment in the workplace; and,
 - [chart](#) of risk factors that lead to harassment and appropriate responses.

Once the workplace reopens, an employer may remind all employees that it is against the federal EEO laws to harass or otherwise discriminate against coworkers based on race, national origin, color, sex, religion, age (40 or over), disability, or genetic information. It may be particularly helpful for employers to advise supervisors and managers of their roles in watching for, stopping, and reporting any harassment or other discrimination. An employer may also make clear that it will immediately review any allegations of harassment or discrimination and take appropriate action.

PPE Accommodations for those with Sincerely Held Religious Beliefs

Please note that the EEO guidelines linked above do not address this issue. However, federal laws (First Amendment to the U.S. Constitution, Title VII of the Civil Rights Act of 1964, and the Religious Freedom Restoration Act) and laws in most states contain protections against workplace discrimination, including discrimination based upon one's religion. Therefore, it is incumbent upon employers to respect their employees' sincerely held religious beliefs and provide appropriate accommodations--similar to the way an employer would have to provide appropriate ADA accommodations--to employees whose faith may require a deviation from the typical workplace regulations.

For instance, a healthcare provider requiring employees to wear N95 respirators should be mindful that some employees may have challenges in passing a fit test due to religious requirements mandating that they maintain facial hair. In these situations, healthcare employers should work with these employees to find suitable alternatives, for instance, by providing and allowing these individuals to wear PAPRs or CAPRs, as these respirators would allow medical professionals to continue to treat patients while protecting them from COVID-19.

As always, the Sikh Coalition encourages you to practice your faith fearlessly. Contact our Legal Team at legal@sikhcoalition.org if you need assistance.